1969

Mary Jane 0. Kloepfer v. Continental Assurance Company : Brief of Defendant Continental Assurance Company

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY JANE O. KLOEPFER,
Plaintiff and Appellant,

vs.

CONTINENTAL ASSURANCE COMPANY,
Defendant and Respondent.

Case No. ~~12179~~ 11581

BRIEF OF DEFENDANT CONTINENTAL ASSURANCE COMPANY

Appeal from the District Court of Cache County
Honorable Lewis Jones, Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS — Continued

CASES AND AUTHORITIES CITED

CASES

STATUTES

TEXTS

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY JANE O. KLOEPFER,
Plaintiff and Appellant,

vs.

CONTINENTAL ASSURANCE COMPANY,
Defendant and Respondent.

Case No. 12179

BRIEF OF DEFENDANT, CONTINENTAL ASSURANCE COMPANY

NATURE OF THE CASE

Plaintiff claims that the life of her deceased husband was insured by defendant at the time of her husband's death on April 11, 1968. Defendant denies the claim and maintains, (1) that the effective date of the policy was clearly and unambiguously declared by the policy's terms to be May 1, 1968 and (2) assuming arguendo that the effective date of the policy as agreed to by the parties could have preceded Kloepfer's death, the policy does not provide insurance coverage for his death because the required premium was not paid nor the requirement of payment waived.

DISPOSITION IN THE LOWER COURT

The case was heard in the lower court on Motions by both parties for Summary Judgment. Based upon the stipulations of the parties, written memorandums presented to the court and arguments, the court entered judgment in favor of defendant, holding that the plaintiff's deceased husband was not insured by defendant at the time of his death.

RELIEF SOUGHT ON APPEAL

Defendant-Respondent, Continental Assurance Company, seeks affirmance of the judgment of the lower court.

STATEMENT OF FACTS

For the purposes of clarification, the defendant wishes to highlight two assertions in the plaintiff's statement of facts with which it particularly disagrees. First, although the relationship of Eldon Joseph Kloepfer to the Kloepfer Construction Company is neither revealed by the record nor relevant to this action, defendant believes that the deceased owned at least the majority interest and perhaps all the interest in the prosperous Kloepfer Construction Company. Second, plaintiff has misconstrued the policy evidenced by Exhibit D. The policy itself states that the sole principals thereto are the defendant and the National Aeronautic Association.

The record reveals that Eldon Joseph Kloepfer by an application dated March 30, 1968 applied for insurance coverage under a group life insurance policy then

in effect between the defendant and the National Aeronautic Association. Immediately above the deceased's signature appeared the following:

> 8. I hereby apply to CONTINENTAL ASSURANCE COMPANY for insurance under *Group Life Insurance Policy issued to the National Aeronautic Association* of which I am a member. I agree that the above answers are complete and true to the best of my knowledge and belief. *I understand that this insurance shall become effective only in accordance with the provisions of such Group Policy.* (Emphasis added) (Ex. C; Record p. 16)

The applicant died in the crash of a private plane late in the evening of April 11, 1968. (Tr. p. 261, ll. 19-20).

On April 11, 1968 the group policy administrator, Charles O. Finley & Company, Inc., mailed to the applicant an envelope containing a letter (Ex. A; Record p. 3), a Certificate of Insurance (Ex. B; Record p. 4) and a Notice of Premium (Ex. E; Record p. 68).

At the top of the first page of the Certificate of Insurance, the parties to the group life policy as well as the policy whose terms controlled were identified in this language:

> Certificate of Insurance issued under the terms of Group Life Insurance Policy No. L 25949 insuring the Members of National Aeronautic Association. (Ex. B; Record p. 4)

The group policy referred to in both deceased's application and in the Certificate of Insurance was Group

Life Insurance Policy No. L 25949 issued to First National Bank of Minneapolis, Trustee of the National Aeronautic Association Group Insurance Trust. (Ex. D; Record pp. 17-43)

The group policy at Page LP 53936 aG (Record p. 30) specifies the dates at which coverage may commence for individuals to be insured under the group policy in this language:

> Each Individual eligible for insurance hereunder who makes written request to the Policyholder, on the Company's forms, to participate in the insurance under this policy, and makes the required payment of premium, if any, shall become insured subject to the following conditions:
>
> (A) Each such Individual must furnish, without expense to the Company, evidence of insurability satisfactory to it before he may become insured. If such evidence is submitted, and payment of the required premium made, if any, the *Individual's insurance shall become effective on the first of the insurance month coinciding with or next succeeding the date the Company determines the evidence to be satisfactory.* (Emphasis added)

The reference date from which insurance months shall be computed is stated in the group policy at Page LP 53936 G (Record p. 23) as follows:

> This policy shall be effective from 12:01 a.m. Standard Time, at the Policyholder's address, on the 1st day of December, 1966, which date shall be its date of issue, for a term of one year, *from which date all insurance months and years shall be computed.* (Emphasis added)

The letter of April 11, 1968 addressed to the applicant from the Administrator of the National Aeronautic Association Group Life Insurance Program, consistent with the effective date policy provisions quoted above, informed the applicant that the company had as of that date determined the evidence of insurability to be satisfactory and that coverage under the group policy became effective May 1, 1968. (Ex. A; Record p. 3) The Certificate of Insurance also stated in bold print in the upper left hand corner of the first page that the effective date was May 1, 1968. (Ex. B; Record p. 4)

Looking now to the provisions concerning payment of premium, deceased's application in bold print on a red background immediately beneath applicant's signature stated as follows:

> PLEASE DO NOT ENCLOSE CHECK WITH THIS APPLICATION — A STATEMENT WILL BE ENCLOSED WITH YOUR POLICY. (Ex. C; Record p. 16)

The group policy requires premiums to be paid in advance in this language:

> 12 PAYMENT OF PREMIUMS
>
> Premiums shall be payable at the Home Office of the Company or to a duly authorized agent of the Company in exchange for the Company's receipt signed by the President or Secretary and countersigned by the Agent designated therein. Premiums are payable annually in advance but with the consent of the Company may be paid semi-annually, quarterly or monthly in advance in accordance with the Schedule of Rates contained herein. (Ex. D, p. LP 53936 G-6; Record p. 36)

The premium notice mailed to deceased on April 11, 1968 stated that the premium due date was May 1, 1968. (Ex. E; Record p. 68)

Even the plaintiff has admitted that payment of the premium was a condition of the policy which had to be satisfied before the coverage would be in effect. (Tr. p. 15, l. 28; p. 16, ll. 28-30)

As for a grace period on the payment of premium both the Certificate of Insurance mailed to deceased and the group policy contain the following language:

> A grace period of thirty-one days, without interest charge, shall be granted for the period of every premium, after the first, during which period the insurance shall continue in force, but in case of a claim during such grace period, any overdue premium will be deducted from the amount of insurance in settlement. (Ex. D, p. LP 53936 G-6; Record p. 36: Ex. B; Record p. 5)

The only premium tendered to the defendant herein was by a check dated May 7, 1968 appearing in Ex. E. (Record p. 68), which check was mailed to the group policy Administrator and received sometime after May 7, 1968. The defendant refused the tender.

ARGUMENT

POINT I

THE TERM "INSURANCE MONTH" AND OTHER TERMS CONCERNING THE EFFECTIVE DATE OF COVERAGE UNDER THE GROUP POLICY ARE CLEAR AND UNAMBIGUOUS AND HENCE THE DECEASED APPLICANT IS BOUND THEREBY.

The plaintiff's claim that the terms concerning the effective date of coverage are ambiguous is not supported by the facts. The term "insurance month" is used throughout both the Certificate of Insurance (Ex. B; Record pp. 4-12) mailed to the deceased and the Group Life Insurance Policy, Number L 25949 (Ex. D; Record pp. 17-48) with its meaning clearly declared in the group policy itself, for on page LP 63936 G, the front page of the group policy (Record p. 23), the term "insurance month" is defined thusly:

> This policy shall be effective from 12:01 A.M. Standard Time, at the Policyholder's address, on the 1st day of December, 1966, which date shall be its date of issue, for a term of one year, *from which date all insurance years and months shall be computed.* (Emphasis added)

This language clearly indicates that the term "insurance month" means any one month period beginning on the same day on which the *group policy* became effective which in this particular policy happened to coincide with the first day of the calendar month.

Examination of both the Certificate (Ex. B) and the Group Policy (Ex. D) reveals that both are basic forms which have been adapted for use in the particular policy here at issue. The term "insurance month" was obviously used throughout these documents to concisely express the above stated concept of an insurance month.

This analysis of the provisions of the controlling group policy reveals that the meaning of the term "insurance month" is clear and unambiguous.

This court has affirmed the principle fundamental to contract law that contracting parties will be held to their clear and understandable language deliberately commited to writing and endorsed by them as signatories thereto.[1]

In *Mofrad v. New York Life Ins. Co.*, 206 F.2d 491 (10th Cir. 1953), the following principle was enunciated:

> . . . 'A contract of insurance rests upon and is controlled by the same principle of law applicable to any other contract. What the contracting parties intended, mutually agreed to, and their minds met upon is the measure of their obligations.' [citations omitted] And if the intentions of the parties are clear from an examination of the contractual documents this court will not rewrite the contract.[2]

Applying the principle here, according to the clear and unambiguously expressed intent of the policy's provisions the effective date had to be May 1, 1968, rather than April 1 or April 11. Because of the clear meaning of these provisions this court may not construe the provisions to mean otherwise.

POINT II

THE APPLICANT AND THE DEFENDANT HAD THE POWER TO DETERMINE THE EFFECTIVE DATE OF INDIVIDUAL COVERAGE. THE DEFENDANT HAD A LEGAL DUTY TO CLEARLY SPECIFY THE EFFECTIVE DATE AND DID NOT ACT ARBITRARILY IN SO DOING.

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[1] *Jensen's Used Cars v. Rice*, 7 Utah 2d 276, 323 P.2d 259 (1958).

[2] 206 F.2d 491, 493; *Accord: Jones v. New York Life Ins. Co.*, 69 Utah 172, 253 Pac. 200, 202 (1927); *White v. Metropolitan Life Ins. Co.*, 63 Utah 272, 224 Pac. 1106, 1108 (1924).

The Utah Supreme Court has repeatedly held that parties to an insurance policy may provide in an application at what time and under what conditions a policy is to become effective and binding.[3]

Indeed, Utah law now requires that each policy issued shall specify "the time at which the insurance thereunder takes effect. . . ."[4] Thus, not only are the parties to an insurance policy permitted to determine the effective date of the policy but under the law of this state the policy must state the effective time.

In the instant case, both the group policy and the Certificate of Insurance set forth the first day of an insurance month as the only date upon which the insurance could take effect. Paragraph 2 of the General Provisions on page LP 53936 aG of the group policy states as follows:

> Each individual eligible for insurance hereunder who makes written request to the policyholder, on the Company's forms, to participate in the insurance under this Policy, and makes the required payment of premium, if any, shall become insured subject to the following conditions:
>
> (A) Each such Individual must furnish, without expense to the Company evidence of insurability satisfactory to it before he may become insured. If such evidence is submitted, *and payment of the required premium made,* if any, *the Individual's insurance shall become effective on the first of the insurance month coinciding with or next succeeding the*

[3] *Jones v. New York Life Ins. Co.,* 69 Utah 172, 254 Pac. 200, 202 (1927); *White v. Metropolitan Life Ins. Co.,* 63 Utah 272, 224 Pac. 1106 (1924); *Sterling v. Lodge,* 28 Utah 505, 80 Pac. 375 (1905).

[4] § 31-19-11 (2) (e) Utah Code Annotated 1953.

date the company determines the evidence to be satisfactory. (Record p. 30)

Similar language referring to the first of an insurance month as the effective date for coverage under certain circumstances is found on the front page of the Certificate of Insurance. (Ex. B; Record p. 4)

Since, as explained in POINT I above, there is no ambiguity in the meaning of the term "insurance month," it is clear that this provision states that there are only twelve dates every year when coverage under the group policy may begin for individuals newly admitted to the group, i.e., the same day of the month as the day when the basic group policy took effect, which in this case was the first day of the calendar month. Furthermore, unless the date of the company's determination that the applicant's insurability is satisfactory coincides with one of the twelve possible effective dates, then coverage may not commence on the day of approval but shall be postponed until the next succeeding possible effective date — which in the instant case was May 1, 1968.

Upon analysis it is clear that the defendant's determination of the effective date of coverage was in strict accord with both the policy's express terms and Utah law and not arbitrary as asserted by the plaintiff.

POINT III

A VALID PREREQUISITE CONDITION OF THE GROUP POLICY REQUIRED THAT THE PREMIUM BE PAID BEFORE THE POLICY COULD BECOME EFFECTIVE.

There is case law too numerous to cite exhaustively which applies the principle that when an insurance policy sets forth conditions which must be met before it becomes effective those conditions must be satified before the policy may take effect.

The following cases are illustrative of this principle:

In *White v. Metropolitan Life Ins. Co.*, 63 Utah 272, 224 Pac. 1106 (1924), the insurance policy provided that the policy would not take effect until the application had been "received, approved and the policy issued and delivered and the full first premium stipulated in the policy has actually been paid to and accepted by the company during the lifetime of the life proposed." There the application had been approved and the policy delivered to the agent and payment of the premium tendered to the agent. However, the agent refused to accept the premium upon learning that the applicant was ill. The applicant subsequently died. The Utah court held that the clause requiring that the premium had to be accepted by the company gave it the right to refuse to accept payment and that the applicant was therefore not insured.

In Mofrad v. New York Life Ins. Co., supra, an Iranian citizen studying at B.Y.U. was killed in an auto-

mobile accident after having completed and delivered an application for life insurance and having paid the first premium. The applicant died before the prerequisite medical examination had been taken. The court held that there was no insurance contract between the parties since the prerequisite condition had not been met.

In *New England Mutual Life Ins. Co. of Boston v. Hinkle*, 248 F.2d 879 (8th Cir. 1957), the deceased had completed and delivered to the insurance company's agent an application and even paid the first quarter premium on a life insurance policy before he was killed in an airplane crash. The policy required a medical examination satisfactory to the company before the policy would be effective. The deceased had not had a medical examination. The court held that the prerequisite condition of a medical examination had not been satisfied so, therefore, the deceased's life was not insured.

As quoted in defendant's Statement of Facts, the group policy required that individual coverage would not become effective until the company had determined that the evidence of insurability was satisfactory and the premium had been paid. Only when those prerequisite conditions had been met could coverage become effective on the first of the next succeeding insurance month.

No payment was tendered to defendant or its agent until sometime after May 7, 1968. This breach of the prepayment of premium requirement is of itself sufficient to support the District Court's judgment.

POINT IV

THERE WAS NO GRACE PERIOD APPLICABLE TO THE FIRST PREMIUM.

Plaintiff by a tortuous and completely illogical construction of the English language claims that paragraph 13, on page LP 53936 G-6 of the General Provisions of the group policy, referring to a grace period of "thirty-one days . . . after the first" refers to the first of the insurance month.

Normal rules of English construction require one to find the noun reference of the adjective "first" within the sentence in which it is used. Applying that rule, which is buttressed by common sense, one can see that that paragraph simply provides that after the payment of the *first premium* there shall be a grace period of thirty-one days for the payment of any succeeding premiums.

This conclusion is firmly supported by comparing the language in question with the language of U.C.A., § 31-23-8, which provides as follows:

> 31-23-8. Grace period.—The group life insurance policy shall contain a provision that the policyholder is entitled to a grace period of *thirty-one days for the payment of any premium due except the first,* during which grace period the death benefit coverage shall continue in force, unless the policyholder shall have given the insurer written notice of discontinuance and in accordance with the terms of the policy. The policy may provide that the policyholder shall be liable to the insurer for the payment of the prorata premium for the time the policy was in force during such grace period. (Emphasis added)[5]

[5]Cf. § 31-22-2, Utah Code Annotated 1953, as amended.

The group policy's grace period provision complies in substantively identical language with the grace period required by Utah law. Nowhere in the Utah statutes is there any reference to a first of an insurance month. Surely the plaintiff does not claim that the word "first" as in the *statutory* phrase "except the first" refers to a first of an *insurance month?*

Assuming, arguendo, the grace period was applicable to payment of the first premium, plaintiff's own reasoning seeks to establish the effective date as April 1, 1968, which would make the due date May 1, 1968. The check tendered by plaintiff was dated May 7, 1968 and not received by defendant until several days after May 7, 1968 and therefore was fatally untimely to plaintiff's claim even accepting plaintiff's premise.

As discussed in POINT III, the contractual prerequisite condition that the policy premium be paid before the policy could become effective is valid and binding.

The policy premium was not tendered to defendant until more than three weeks after the date of the applicant's demise and at least one week after the premium due date of May 1, 1968. The principles discussed in POINT III declare that this failure alone is sufficient to support the District Court's ruling.

POINT V

THE DOCTRINE OF WAIVER IS NOT APPLICABLE TO THIS SITUATION.

As a general rule, the doctrine of waiver, both as to effective date and as to payment of premium, is

utilized in contractual matters only when a party does not specifically state the effect intended by his act. One authority states this principle as follows:

> . . . [*I*]*n the absence of anything said or done by the insurer's agent when delivering* the policy relative to the postponement of the effective date thereof, it becomes valid at that time regardless of the fact that the insured may die the following day. (Emphasis added)[6]

However, here the company agent clearly indicated in the letter accompanying the Certificate of Insurance and on the Certificate of Insurance that coverage under the group policy was not to take effect until May 1, 1968.

Furthermore, recall here the discussion in POINT I of the Utah cases which unequivocally establish that parties to an insurance agreement may agree upon the effective date of the policy. If this court were to find a waiver of either the payment of premium requirement or the stated effective date of May 1, this would be in effect a ruling that notwithstanding anything said or done by either party to any insurance contract, the effective date of any insurance policy would be as a matter of law the date upon which it is delivered to the insured. Such a ruling would be directly contrary to both the established law of Utah and the general principle on waiver quoted above. Nor is there any sound reason why this general rule should be established. No public policy requires the establishment of such a rule.

Plaintiff cites the case of *Loftis v. Pacific Mutual Life Ins. Co.*, 38 Utah 532, 114 Pac. 134 (1911) to support

[6]Appleman, Insurance Law and Practice, § 138.

his statement that an insurer may waive its right to a premium.

The facts in the *Loftis* case were these. The deceased was covered under a group policy then in effect and two premium payments had been paid by payroll deduction from deceased's check. The policy provided that if the premium for any particular period were not paid, coverage under the group policy would lapse. By agreement, the only permitted method of payment was payroll deduction. At the due date of the next premium, the deceased had not earned enough to cover the premium, hence it was not paid. On the following due date, the defendant insurance company notified the employer of the amount of premium then due on deceased's insurance who just recently had been killed. When the employer tendered the premium the insurance company by then having learned of the death refused the premium and claimed the policy had lapsed. The insurance company had accepted the premiums on other living employees under otherwise identical circumstances, i.e., past due premiums due to inadequate earnings and subsequent billing of the employer by the insurance company for the past due premiums. Those facts were submitted to the jury, who found a waiver. On appeal, the defendant urged that as a matter of law there was no waiver. This court affirmed the district court on the grounds that a waiver may be found if a course of conduct by the company or authorized agent induced a reasonably founded and honest belief that strict compliance with the policy provisions would not be insisted upon. Note that this rule is consistent with the rules relied on by defendant.

Unlike the *Loftis* case, the parties here precisely stated when and under what conditions the policy was to take effect. There was never expressed any intent to waive either the requirement that the premium be paid prior to the insurance becoming effective or the stated effective date of May 1, 1968. *Indeed, the express intent was clearly to the contrary.*

Relative to the payment of the premium, the application completed by applicant specifically provided that no premium was to be enclosed in the application. The clear implication being that a notice of premium would be sent later if the company accepted the applicant. Enclosed in the same envelope with the Certificate of Insurance and the letter stating the effective date of the policy to be May 1, 1968, was a Notice of Premium indicating that the premium was due May 1, 1968. The defendant contends that under these circumstances for this court to hold that there was a waiver would totally disregard the right of the parties to contract and totally disregard their intent as clearly expressed in the documents in evidence before the court.

Finally, this court in *Jones v. New York Life Ins. Co.*, 69 Utah 172, 253 Pac. 200, 203 (1927), a situation identical in all relevant and material respects to the instant one, has already held that the doctrine of waiver is not here applicable.

In the *Jones* case, the policy stated that before it would be in effect it must be delivered, the premium paid and *the applicant must not have consulted or been*

treated by a physician since his medical examination. After taking the insurance medical examination, the applicant contracted spinal meningitis for which he was treated by a physician and from which he subsequently died. The premium had been paid and the agent had delivered the policy even though he knew of the applicant's subsequent treatment by a physician. The plaintiff tried to claim the delivery constituted a waiver of the relevant condition. This court held that the doctrine of waiver was not there applicable, stating that the theory of waiver necessarily presupposed in that instance the existence of a valid contract and that since there was no contract there was no waiver of the contract terms.

For the reasons set out above, it must be concluded that under the circumstances of the instant case, mere delivery of a certificate of insurance was not a waiver of either the stated effective date or the requirement that the premium be paid prior to or on the effective date.

CONCLUSION

The law and the undisputed facts as set forth above unequivocally demonstrate that the provisions of the policy were clear and not ambiguous, that these provisions were within the parties' power to agree to, that the provisions are lawful and not to be reformed by any court, that the conditions prerequisite to the policy taking effect had been neither satisfied nor waived and consequently, the applicant's life was not insured by the defendant at the time of his untimely and unfortunate

death. For these reasons, the District Court's judgment should be affirmed.

DATED this ..... day of....., 1969.

Respectfully submitted,

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